

Legal standards in the wake of the EU-Turkey deal

6 April 2016



Outline

- The work of ECRE
- Recent EU asylum policy changes
 - *Council Decisions on Relocation*
 - *EU-Turkey*
- Refugee Crisis or Crisis of Legality?
Questions of legal standards,
jurisprudence and practicalities



- ECRE was founded in 1974
- Comprises 90+ organisations in 38 European countries
- Mission: promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law
- Core activities: (comparative) research, advocacy, knowledge-sharing



ECRE Members



ECRE's projects

- AIDA – The Asylum Information Database
- EDAL – The European Database of Asylum Law
- No Longer Alone - Advancing reception standards for unaccompanied children
- LEAP - Legal exchange and mutual learning between asylum practitioners to promote fundamental rights in the EU

The Asylum Information Database (AIDA) Project

- Detailed reports on procedure, reception conditions and detention of asylum seekers in 18 countries (16 EU MS; Switzerland; Turkey).
- Annual reports on the situation of asylum in Europe. 3rd report to be published in September.
- ECRE missions (Greece; Hungary; Austria 2015).
- Legal briefings on legal questions around the treatment of asylum seekers (detention under the Dublin Regulation; provision of statistics).



A publicly accessible online database containing key asylum and refugee case law from 17 European Union Member States as well as jurisprudence from the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR).

Austria	Belgium	Czech Republic
Finland	France	Germany
Greece	Hungary	Italy
Ireland	The Netherlands	Poland
Slovakia	Slovenia	Spain
Sweden	UK	

Objective

Contributing to the quality and consistency of decision-making within asylum law across the EU by allowing practitioners, decision and policy-makers to learn from and use precedents from other European member states.

<http://www.asylumlawdatabase.eu/en>

The European Legal Network on Asylum (ELENA)

- The ELENA network is a [forum of 500 legal practitioners](#) who specialise in asylum and refugee law across 37 European states
- The network facilitates the exchange of information and experience between legal practitioners across Europe
- The network intervenes in European litigation and provides legal support for domestic cases

Latest intervention before the ECtHR: [N.D. and N.T. v. Spain](#) (push-backs in Melilla)

- ELENA publishes research on the implementation of national, European and international law relating to those in need of international protection.

Latest publication: [Information Note](#) on Dublin transfers post-Tarakhel: Update on European case law and practice.

- ELENA organises seminars on specific topics relating to refugee law
- The ECRE Secretariat publishes the ELENA Legal Update on a weekly basis.

Recent EU asylum policy changes

- *EU- Turkey deal – 17-18 March 2016*

Agreement, *inter alia*, that:

- 1) All new irregular migrants whether persons not applying for asylum or asylum seekers whose applications have been declared inadmissible crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey;
- 2) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU from Turkey directly;
- 3) Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU;
- 4) Once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated;
- 5) The fulfilment of the visa liberalisation roadmap will be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements.



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- Based on Joint Action Plan October 2015 + EU-Turkey Readmission Agreement in force since October 2014 but ONLY relating to Turkish citizens.
- Whereas before agreements related to readmission of irregular migrants who are not in need of international protection March deal allows return of those who are in need of international protection on grounds that they already had protection in Turkey or that they can seek it there.
- Deal not legally binding but individual elements are binding – most important of these are Articles 35 and 38 of the recast Asylum Procedures Directive 2013/32/EU and the transposition of these articles by Greece.

Crisis in Legality – Greece’s legal obligations under EU and International Law

- Primary Law

Art 78(1) TFEU

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

Article 51(1) of the Charter of Fundamental Rights

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

Article 52(3)

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

SO....

Member States must respect and abide by primary law, including the Charter and general principles in actions which fall under EU law, and are required to respect, *inter alia*, the ECHR and 1951 Geneva Convention. Primary law will be used as a means to test the legality of secondary law and the implementation of EU law by Member States must be done in a way that renders it compatible with primary law obligations.

Secondary EU law – recast Asylum Procedures Directive

- **Access to the procedure**

By virtue of Article 18 and 19 of the Charter as well as recitals 20, 25, 27 34 and Articles 6, 8 and 12(c) recast APD it is incumbent on States to ensure that effective access to asylum procedures is provided for those seeking asylum.

These obligations also stem from the ECHR, whereby the **positive obligation** on States to enable those seeking protection to identify themselves and to ensure access to fair and effective international recognition procedures flows from the principle of non-refoulement and prohibition against collective expulsions.

- See ECtHR MSS v Belgium and Greece; Hirsi; Sharifi

Reading of both EU law and ECHR obligations REQUIRE:

Pro-active identification of protection needs, in conjunction with legal assistance and interpretation regarding procedures, lodging to be effectively assured for the applicant in a precise time frame, timely notification and referral by non-competent authorities to competent ones where a request for protection has been made to the former, and provision of information combined with interpretation on the procedure in detention centres or border points for those wishing to make an application.

- **Examination of claim for asylum**

Article 10(3) of recast APD

Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are **examined and decisions are taken individually, objectively and impartially**;

(b) **precise and up-to-date information** is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions know the relevant standards applicable in the field of asylum and refugee law;

(d) the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.

+ Communicative guarantees – stemming from personal interview before a decision is taken by determining authorities (Art 14 and 34 recast APD).

Application to Safe Third Country and First Country of Asylum

Safe Third Country - 38(2)

Obligations related to examination **equally apply to assessing whether a country is a Safe for the applicant** as 38(2) of the recast APD requires:

National rules on a connection between the applicant and the third country concerned on the basis of which it would be reasonable to go to that country. The **applicant shall be allowed to challenge the existence of a connection between him or her and the third country**.

Rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe.

Rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances.

First Country Asylum – 35

Same safety assessments may also apply, in any case will have to examine under 25(b) whether the sufficient protection requirement is applicable.

Both are subject to an effect remedy- meaning opportunity to appeal a STC or FCA decision

Reality in Moria Hotspot



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Safety of Turkey

STC requirements 38(1)

previous state will readmit the person;

grant the person access to a fair and efficient procedure for determination of his or her protection needs;

permit the person to remain;

and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from refoulement.

Where she or he is entitled to protection, a right of legal stay and a timely durable solution are also required.

FCA requirements 35(a) and (b)

Recognised as a refugee OR enjoys sufficient protection including benefitting from principle of NR

no risk of persecution within the meaning of the 1951 Refugee Convention

no risk of onward refoulement

access to rights to adequate living standards, work, education and health care

access to a secure legal status

assistance to persons with special needs and

timely access to a durable solution.

Reality in Turkey

- Geographical limitation to 1951 Convention – barrier to asylum BUT established TP regime for Syrians and International protection status for non-Syrians. Nonetheless only bound by the 1951 Convention obligations in regards to ‘European’ refugees.
- Syrians – right to reside but denied prospect of long-term legal integration + limited rights to education and employment.
- Other nationalities – conditional refugee status not offered the prospect of long-term legal integration in Turkey and excluded from “family unification” rights
- Allegations of non-refoulement.
- Constant allegations of ill treatment towards asylum seekers and migrants.

Legality of elements to deal

- Neither the procedural safeguards or the country conditions are complied with in either Greece or Turkey.
- Given that these are required for a legal application of STC and FCA and that these articles are the legal basis for the EU-Turkey deal, we would argue that the elements making up the deal are unlawful.

Discussion and questions?



Photo: Giorgiós Moutafis